

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-6093

No. 77-6093

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

WINIFRED D. MORIO, Regional Director of
Region 2 of the National Labor Relations
Board, for and on behalf of the NATIONAL
LABOR RELATIONS BOARD,

Petitioner-Appellee,

v.

LOCAL 456, INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND
HELPERS OF AMERICA,

Respondent-Appellant

ON APPEAL FROM AN ORDER OF THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PETITIONER-APPELLEE



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ON APPEAL FROM AN ORDER OF THE
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BRIEF FOR PETITIONER APPELLEE

I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the court below was incorrect in finding that the petitioner-appellee National Labor Relations Board had reasonable cause to believe that the respondent-appellant violated Section 8(b)(7)(C) of the National Labor Relations Act.
2. Whether the court below abused its discretion in finding that injunctive relief under Section 10(1) of the Act pending litigation of the

unfair labor practice charge before the National Labor Relations Board was "just and proper."

II. COUNTERSTATEMENT OF THE CASE

This is an appeal from an order of the United States District Court for the Southern District of New York, per Judge D. J. Cannella, granting a petition for temporary injunction filed on behalf of the National Labor Relations Board (herein the "Board"), by Winifred D. Morio, Regional Director of the Second Region of the Board (herein the "Regional Director"), Petitioner-Appellee herein, pursuant to the provisions of Section 10(1) of the National Labor Relations Act, as amended (61 Stat. 149; 73 Stat. 544; 29 U.S.C. Section 160(1), herein the "Act"). Jurisdiction of this Court is invoked under Sections 1291 and 1292 of Title 28 of the United States Code.

A. The Proceedings Below

On April 26, 1977, Construction City Corporation (herein "CCC"), filed with the Board an unfair labor practice charge alleging that Local 456, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein the "Union"), was picketing CCC in violation of Section 8(b)(7)(C) of the Act, which Section proscribes certain recognitional or organizational picketing (A. 10). ^{1/} Following an investigation of the charge, the Board's Regional Director concluded that there was reasonable

^{1/} "A." references are to the Joint Appendix prepared and filed by the Union.

cause to believe that the Union was engaging in the unfair labor practice alleged and that a complaint should issue. ^{2/} Accordingly, on May 5, 1977, the Regional Director filed with the court below the instant petition for preliminary injunctive relief pursuant to Section 10(1) of the Act (A. 5-9).

On May 11, 1977, pursuant to an Order to Show Cause (A. 3-4), the Union filed its Answer and Memorandum in support thereof, denying that the picketing had an unlawful recognitional object and averring that the purpose and intent of the Union was to conduct lawful, "area standards" picketing (A. 12-18).

On May 13, the district court conducted an evidentiary hearing at which all parties were afforded full opportunity to, and did, present evidence and arguments, including the submission of briefs. On May 26, the district court issued its Decision finding reasonable cause to believe the Union was violating the Act as charged and granted the Board's request for a temporary injunction pursuant to Section 10(1) (A. 31-38). On June 6, the court entered its Order Granting Temporary Injunction (A. 38). It is from this Order that the Union now appeals. ^{3/}

^{2/} An unfair labor practice complaint was issued on May 12, 1977, which alleged that the Union engaged in unlawful picketing for a recognitional and organizational object (Board Case No. 2-CP-577). On June 13, a hearing was conducted before an Administrative Law Judge. No decision has been rendered in that proceeding.

^{3/} The Union moved this Court for a stay pending its appeal or, in the alternative, an expedited appeal. On June 21, this Court denied the Union's motion for a stay but set the case for expedited appeal.

B. Statement of Facts ^{4/}

1. Background

CCC is a New York corporation with its main place of business located in Mamaroneck, New York. CCC is engaged in the wholesale and retail sale of building and construction supplies (A. 6, 12). The Union is not currently certified as the representative of any of the employees of CCC, nor has it filed a petition under Section 9(c) of the Act seeking to represent the employees of CCC (A. 7, 12).

2. The instant picketing

The Union began picketing outside the premises of CCC located at 519 Fenemore Road, Mamaroneck, New York on about October 26, 1976 (A. 32; 7, 12, 44). The picket signs carried by the pickets stated in pertinent part (A. 7, 13, 45) ^{5/} :

Protest sub-standard wage conditions being paid
on this job.

Local 456 does not intend by this picket line
to induce or encourage the employees of another
employer to engage in a strike or concerted
refusal to work.

^{4/} In the following statement of facts, references preceding a semicolon are to the district court's findings; those following are to the supporting evidence. The facts are essentially undisputed, the Union having called no witnesses.

^{5/} In preparing the Appendix, the Union inadvertently failed to complete the pagination of the transcript and other papers reproduced therein. For example, page 45 of the Appendix is not so designated. In addition, the Union failed to paginate the last 16 pages of the Appendix following page 91. We will refer to the pages of the Appendix as if they were properly, consecutively numbered throughout.

The Union did not inform CCC that CCC was not paying area standard wages before it commenced its picketing of CCC's Mamoroneck facility, and CCC was not aware that the Union had a dispute with it until the Union started its picketing (A. 44-45). The picketing occurred on each workday and has continued uninterrupted until enjoined by the district court on May 26, 1977 (A. 33; 7, 12, 44).

On November 17, 1976, CCC filed a charge with the Board's Regional Office (Board Case No. 2-CP-563) alleging, in substance, that an object of the Union's picketing was to force or require CCC to recognize the Union as the collective bargaining representative of CCC's employees (A. 20). On the evidence available at that time, the Regional Director concluded that the charge lacked merit and dismissed the charge (A. 21-22). ^{6/} On March 4, 1977, Robert E. Allen, the Director of the General Counsel's Office of Appeals, denied CCC's appeal from the Regional Director's dismissal of the charge in Case No. 2-CP-563, again on the basis that the evidence was insufficient to establish that the Union's picketing had an unlawful recognitional or organizational object (A. 23-24). ^{7/}

^{6/} The dismissal letter was signed by Edwin H. Bennett as Acting Regional Attorney. Mr. Bennett is the Regional Attorney but on that date was Acting Regional Director empowered to take the action referred to in the letter. The misdesignation was an inadvertency.

^{7/} Throughout its Brief, the Union erroneously refers to the denial of CCC's appeal by the Office of Appeals as the action of the Board (Br. pp. 4, 13, 18, 23). In fact, the Office of Appeals is a part of the General Counsel's Division of Litigation which has been established to review appeals from Regional Directors' refusals to issue unfair labor practice complaints. The Office of Appeals operates within the

(Continued on page 6)

Upon learning that its appeal from the dismissal of its unfair labor practice charge was denied, CCC undertook an evaluation of the cost of the Union's area collective bargaining contracts, a copy of which had been supplied by the Union (A. 32; 47-48, 58, 96-107). Thereafter, also during the first week in March 1977, CCC increased the wages and other benefits paid to its employees to equal or exceed wages being paid to similarly situated workers under the Union's contract (A. 32; 48-56, 92). Its Board of Directors also adopted a corporate resolution instituting an employee compensation plan effective immediately (A. 32; 49-50, 93-95). Pursuant to this plan, CCC is required to make an irrevocable contribution to a separate fund for the exclusive benefit of its employees, which contribution amounts to \$75 per week for each employee and is in addition to wages (Ibid.). The plan further provides that contributions to each employee's account shall vest after ten years of employment (Ibid.).

After instituting these changes in its wage and adopting its benefit plan, Jerome J. Zaccaria, General Manager of CCC, sent a telegram to the Union on April 20, notifying it that the changes were in effect and that CCC now met the area wage and benefit standards. CCC also requested that the Union remove its pickets (A. 32-33; 56, 57, 77).

Continued ^{7/} General Counsel's exclusive authority, under Section 3(d) of the Act, to investigate charges, issue complaints, and prosecute such complaints before the Board. See NLRB Rules and Regulations (29 C.F.R.) Section 102.19. See also, Section 202.13 of NLRB Organization and Functions, 32 F.R. 9588, as amended by 37 F.R. 15956, reprinted at pp. 317-318 of the Board's Rules and Regulations and Statements of Procedure, Series 8, as amended. Indeed, by affirming, on behalf of the General Counsel, The Regional Director's refusal to issue complaint in Case No. 2-CP-563, the Office of Appeals precluded Board consideration of the merits of the charge.

On April 22, CCC sent a mailgram to the Union, inviting the Union to visit CCC's office in order to allow CCC to verify its claim (A. 58-59, 77). Following an exchange of communications, a meeting between the parties was arranged for May 4, 1977 (A. 27-30, 57, 59, 77).

On May 4, 1977, representatives from CCC met with the Union's attorney, John R. Harold, and other Union officials (A. 33; 76). CCC's attorney, Thomas McDonough, began the meeting by running through a cost comparison of the wages and benefits CCC paid to its employees with the wages and benefits provided under the Union's standard collective bargaining agreement in the area (A. 33; 77-78). McDonough also described CCC's newly instituted pension plan to demonstrate that CCC now met the Union's welfare, pension and supplemental benefits (A. 33; 79, 81).

Union attorney Harold and Union Secretary-Treasurer Revellese initially stated that the Union was not looking for recognition. However, when McDonough finished his comparison of the cost items, Harold stated that, "unless you meet this contract term for term then you are not meeting area standards." After some additional discussion the Union asked for a recess. When the Union representatives returned Harold again stated that CCC was not paying area standards because CCC was not meeting the Union's contract "point for point." Revellese specifically observed that "you don't have any seniority; you don't have job security; you don't have layoff programs." In response to McDonough's question "What do you see to be the area standards?" Harold simply pointed to the Union's contract (A. 34; 79-80).

C. The District Court's Findings, Conclusion and Order

Based on these uncontested facts, the district court concluded that there was reasonable cause to believe that the Union was picketing CCC with an object of forcing or requiring CCC to recognize or bargain with it as a representative of CCC's employees in violation of Section 8(b)(7)(C) of the Act (A. 35). In this respect, the court observed that since "CCC, on the whole, meets or exceeds all the cost items in the Union contract, Union attorney Harold's insistence that the Union contract be met point by point indicates that the dispute has surpassed the scope of area standards and has trespassed into the realm of collective bargaining" (A. 35). The court properly recognized that "although other inferences might be drawn from the testimony concerning the May 4 meeting, the Board's choice of the one most favorable to the employer should be upheld by a district court ruling on a case in this posture" (A. 34). Accordingly, the court issued its order enjoining the Union, "its officers, representatives, agents, servants, employees, attorneys, and all members and persons acting in concert or participation with it or them . . . from picketing or causing CCC to be picketed, except as permitted by law" pending final disposition of the matter by the Board (A. 38).

ARGUMENT

I. THE STATUTORY SCHEME PURSUANT TO WHICH INJUNCTIVE RELIEF WAS SOUGHT: THE APPLICABLE STANDARDS

Section 10(1) ^{8/} of the Act empowers district courts to grant "just and proper" injunctive relief pending the Board's resolution of unfair labor practice charges made subject to its provisions. In brief, Section 10(1) embodies the determination of Congress that certain unfair labor practices, including unlawful recognition picketing as defined in Section 8(b)(7) of the Act, give or tend to give rise to such serious inter-

^{8/} Insofar as pertinent, Section 10(1) provides as follows: Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of . . . section 8(b)(7), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: * * * Provided further, that such officer or regional attorney shall not apply for any restraining order under section 8(b)(7) if a charge against the employer under section 8(a)(2) has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue. * * *

ruptions to commerce as to require their discontinuance, pending adjudication by the Board on the merits, to avoid irreparable injury to the policies of the Act and the frustration of the statutory purpose which would otherwise result. S. Rep. No. 105, 80th Cong., 1st Sess., pp. 8, 27, 1 Legislative History of the Labor Management Relations Act, 1947, 413 433 (G.P.O., 1948); Danielson v. Joint Board of Coat, Suit & Allied Garment Workers Union, 494 F. 2d 1230 at 1241-1242 (C.A. 2, 1974); Hirsch v. Building & Construction Trades Council, 530 F. 2d 298, 302 (C.A. 3, 1976); Squillacote v. International Brotherhood of Teamsters, Local 344, ___ F. 2d ___, No. 76-2117, decided June 29, 1977, slip op. 6-7 (C.A. 7). Therefore, Congress imposed a mandatory duty upon the Board's Regional Director to seek injunctive relief in the appropriate district court if, upon investigation of a charge alleging such violations, he has reasonable cause to believe the violation has occurred.

Since injunctive proceedings under Section 10(1) of the Act are ancillary to the main unfair labor practice case, and any injunction issued thereunder is interlocutory in nature and expires upon the Board's rendering its final decision, Sears, Roebuck & Co. v. Carpet, Linoleum, etc., Layers Local Union 419, 397 U.S. 655, 658-659 (1970), ". . . it is well settled that the district court need not decide that an unfair labor practice has actually occurred but merely must decide whether the Board has reasonable cause to believe there has been a violation of the Act." Danielson v. International Organization of Masters, Mates & Pilots, AFL-CIO, 521 F. 2d 747, 751 (C.A. 2, 1975); Seeler v. Trading Port, Inc., 517 F. 2d 33, 36

(C.A. 2, 1975), and cases there cited; ^{9/} Kaynard v. Independent Routemen's Association, 479 F. 2d 1070, 1072 (C.A. 2, 1973). Rather, "the Regional Director faces a relatively insubstantial burden of proof when he petitions a district court for temporary injunctive relief pursuant to Section 10(1)." Hirsch v. Building & Construction Trades Council, supra, 530 F. 2d at 302; Squillacote v. Graphic Arts International Union, 540 F. 2d 853, 858 (C.A. 7, 1976). In the latter case, the Seventh Circuit reiterated that "the evidence need not establish a violation. It is sufficient . . . if there be any evidence which together with all the reasonable inferences that might be drawn therefrom supports a conclusion that there is reasonable cause to believe a violation has occurred." Ibid.

As this Court has stated (Danielson v. Joint Board of Coat, Suit & Allied Garment Workers Union, supra, 494 F. 2d at 1245):

When 'reasonable cause to believe' turns on disputed issues of fact, the Regional Director may assume these in favor of the charge and the district court should sustain him if his choice is within the range of rationality. If differing inferences may fairly be drawn from the facts he has found, he may choose the one more favorable to the charging party, and this too should be upheld.

Indeed, this Court has held that where "there are disputed issues of fact . . . , the Regional Director should be given the benefit of the doubt" Seeler v. Trading Port, Inc., supra, 517 F. 2d at 36-37. Accord:

^{9/} Seeler v. Trading Port arose out of a Section 10(j) proceeding. However, as this Court observed, 517 F. 2d at 36, n. 5, in this circuit, "the district court should apply the same standards in Section 10(1) cases as it does in Section 10(j) cases." See also Danielson v. Joint Board, supra, 494 F. 2d at 1242.

Danielson v. International Organization of Masters, Mates & Pilots, AFL-CIO, supra, 521 F. 2d at 751; Squillacote v. Graphic Arts International Union, supra, 540 F. 2d at 858-859. In short, the

standard of "reasonable cause" is satisfied if there is a showing of factual issues which must be resolved by the Board. Section 10(1) commands the courts to disregard their traditional reluctance to issue preliminary injunctions when there is substantial conflict in the evidence.

Wilson v. Milk Drivers and Dairy Employees Union, Local 471, 491 F. 2d 200, 203 (C.A. 8, 1974).

Similarly, the legal propositions advanced by the Regional Director need not be finally and conclusively established. Instead, even where the proposition of law is unsettled or is one of first impression, "the district court should be hospitable to the views of the Regional Director⁷, however novel." Danielson v. Joint Board of Coat, Suit & Allied Garment Workers Union, supra, 494 F. 2d at 1245. Accord: Danielson v. International Organization of Masters, Mates & Pilots, AFL-CIO, supra, 521 F. 2d at 751 ("The district court should defer to the statutory construction urged by the Board").

Moreover, if the district court concludes there is reasonable cause to believe the violation alleged has been engaged in, the court must grant such relief as it deems just and proper. Danielson v. International Organization of Masters, Mates & Pilots, AFL-CIO, supra, 521 F. 2d at 751. For, where Congress sets the standards for the issuance of injunctions, those standards, and no others, need be satisfied to sustain the prayer for injunctive relief. Douds v. International Longshoremen's Association, 242 F. 2d 808, 811-812 (C.A. 2, 1957); Brown v. Pacific Telephone & Telegraph

Co., 218 F. 2d 542, 544-545 (C.A. 9, 1955) (Pope, J., concurring). As this Court has recently stated, "the standards of the public interest, not the requirements of private litigation, measure the propriety and need for injunctive relief." Seeler v. Trading Port, Inc., supra, 517 F. 2d at 39-40, quoting from Hecht Co. v. Bowles, 321 U.S. 321 (1944).

Finally, with respect to appellate review of Section 10(1) injunctions granted by the district court, this Court has held that the district court's conclusions respecting the existence of reasonable cause are reviewable under the standard of whether they are "correct", and that its exercise of discretion in fashioning a "just and proper" remedy is reviewable under the standard of whether the district court abused its discretion. Danielson v. Joint Board, etc., supra, 494 F. 2d at 1244 and n. 22.

We will show below that the Regional Director's theory of violation in this case is based on established principles of law which, applied to the undisputed facts in this case, reveal a clear violation of Section 8(b)(7)(C) of the Act. Under these circumstances it cannot be said that the district court's finding of reasonable cause was incorrect, or that the grant of injunctive relief was an abuse of discretion. In fact, a denial of a preliminary injunction would have constituted reversible error.

II. THE DISTRICT COURT PROPERLY CONCLUDED THAT THERE WAS REASONABLE CAUSE TO BELIEVE THAT THE UNION VIOLATED SECTION 8(b)(7)(C) OF THE ACT

Section 8(b)(7) of the Act, enacted as part of the 1959 Landrum-Griffin amendments, constitutes a comprehensive code governing recognitional and organizational picketing. N.L.R.B. v. Drivers, Local 639 (Curtis Bros.), 362 U.S. 274, 291 (1960). That Section provides, in pertinent part:

Section 8(b) It shall be an unfair labor practice for a labor organization or its agents --

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under section 9(c) of this Act.

(B) where within the preceeding twelve months a valid election under section 9(c) of this Act has been conducted, or

(C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: Provided, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9(c)(1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: Provided further, That nothing in the subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Prior to the enactment of Section 8(b)(7) in 1959, the Act had, in Section 8(b)(4)(C), prohibited recognitional picketing only where there was another labor organization which had been certified as the representative of the employees. Thus, a union could lawfully picket an unorganized employer for an unlimited length of time, either to compel it to recognize it as the bargaining representative of his employees or to force the employees to select it as their representative. The Board, courts, and commentators have pointed out that Section 8(b)(7) was enacted as a corollary to the federal policy of ensuring employees a free choice in the selection of a bargaining representative. Dayton Typographical Union No. 57 v. N.L.R.B., 326 F. 2d 630, 649 (C.A. D.C., 1964); Local 542 Operating Engineers (R.S. Noonan, Inc.), 142 NLRB 1132 (1963), enf'd. 331 F. 2d 99, 107 (C.A. 3, 1964), cert. denied, 379 U.S. 889; Cox, The Landrum-Griffin Amendments to the NLRA, 44 Minn. L. Rev. 257, 262-266 (1959).

When considered together, the three subdivisions of Section 8(b)(7) represent a carefully designed plan to further the orderly resolution of disputes over representation of employees by requiring that such questions be settled through Board election procedures rather than as a result of coercive picketing. Specifically, Subparagraph (C) of Section 8(b)(7) prohibits organizational or recognitional picketing by an uncertified union, unless an election petition is filed under Section 9(c) of the Act within a reasonable period of time, not to exceed thirty days. If no such petition is filed, continuation of the picketing beyond the reasonable period becomes an unfair labor practice. See e.g., N.L.R.B. v. Suffolk

County District Council, 387 F. 2d 170, 173 (C.A. 2, 1967), citing with approval International Hod Carriers, Local 840 (Blinne Construction Co.), 135 NLRB 1153, 1167 (1962); Dayton Typographical Union v. N.L.R.B., supra, 326 F. 2d at 647-649; Meltzer, Organizational Picketing and the NLRB, 30 U. of Chi. L. Rev. 78, 79-83 (1962).^{10/} That provision thereby removes the threat to employees' free choice by encouraging prompt resort to the Board's election machinery, rather than the economic pressure of picketing, as the method for resolving questions of representation. As the Ninth Circuit stated in Department & Specialty Store Employees, Local 1265, etc. v. Brown, 284 F. 2d 619, 626 (1960), cert. denied, 366 U.S. 934, "there is no doubt that the purpose of this legislation is to place rather severe and drastic limitations on picketing, other than informational, and to provide for a representation election without delay."

While it is generally acknowledged that most union picketing activity directed against a nonunion employer has as its ultimate goal union recognition and bargaining, the Board and the courts have also recognized that "a union may legitimately be concerned that a particular

^{10/} Subparagraph (C) is subject to two qualifications; if a timely petition is filed, the picketing may continue pending the processing of the petition; but, in order to avoid undue prolongation of the picketing, the first provision expedites the election procedure. Moreover, the second provision permits certain kinds of informational picketing to continue indefinitely so long as an effect of such picketing is not to induce a stoppage of deliveries. Picketing of this latter nature is not involved herein.

employer is undermining area standards of employment by maintaining lower standards. It may be willing to forego recognition and bargaining provided subnormal working conditions are eliminated from area considerations."

International Hod Carriers, Building and Common Laborers Union of America, Local No. 41, AFL-CIO (Calumet Contractors Association), 133 NLRB 512

(1961). Thus, the Board has held that a Union's picketing of an unorganized employer for the purpose of inducing him to conform to the prevailing area standards does not necessarily encompass a recognitional or organizational object and fall within the prohibitions of Section 8(b)(7) of the Act.

Houston Building & Construction Trades Council (Claude Everett Construction Company), 136 NLRB 321, 322, 323 (1962). Centralia Building & Construction Trades Council v. N.L.R.B., 363 F. 2d 699, 701 (C.A. D.C., 1966); Culinary Workers v. N.L.R.B., 501 F. 2d 794, 799, n. 11 (C.A. D.C., 1974).

However, the area standards protected are only those related to labor costs which, if not observed, give the nonobserving employer an unfair competitive advantage over those who pay the prevailing wage scales and fringe benefits. Retail Clerks International Association, Local Union No. 899, AFL-CIO (State-Mart, Inc.), 166 NLRB 818, 823 (1967), enf'd. 404 F. 2d 855 (C.A. 9, 1968); Sales Delivery Drivers, Warehousemen & Helpers Local 296 of Santa Clara and San Benito Counties, California (Alpha Beta Acme Markets, Inc.), 205 NLRB 462, 469 (1973); Automotive Employees, Laundry Drivers & Helpers, Local No. 88, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (West Coast Cycle Supply Co.), 208 NLRB 679, 680 (1974). And, in order for the "area standards" rule to apply, the union must have the protection of area standards as its sole

object, to the exclusion of any recognitional or organizational intent. Culinary Workers v. N.L.R.B., supra, 501 F. 2d at 799, n. 9; Centralia Building & Construction Trades Council v. N.L.R.B., supra, 363 F. 2d at 701.

For it is settled that for picketing to violate Section 8(b)(7) "recognition or organization need not be the sole or principal object of the picketing; it is sufficient to make out a violation if one of the union's objects is within the statutory language." N.L.R.B. v. Suffolk County District Council of Carpenters, supra, 387 F. 2d at 173; N.L.R.B. v. Knit-good Workers Union Local 155, 403 F. 2d 388, 390 (C.A. 2, 1968), and cases there cited. Where such an object exists, it is immaterial that the picketing may have other, legitimate objects as well.

Nor does the Board give this "area standards" doctrine unlimited application; indeed, because purported area standards picketing may easily be employed as a disguise for what is really unlawful recognitional or organizational activity, the Board will not accept at face value a union's declarations as to its intent -- e.g., the legend appearing on the picket signs, and oral disclaimers of recognitional goals. Such assertions may likely be self-serving. Carpenters Local Union 1260 (Seltzer Construction Co.), 210 NLRB 628, 630, and cases cited therein, enf'd. 513 F. 2d 637 (C.A. 8, 1975); International Brotherhood of Electrical Workers, Local 953 (Erickson Electric), 154 NLRB 1301 (1965). Rather, the Board will

always carefully scrutinize the circumstances surrounding alleged area standards picketing to determine if the union in pursuing this course of action has accepted the required limitations, and may reasonably be said to be seeking no more than an equalization of competitive advantage rather than the attainment of a bargaining relationship.

West Coast Cycle Supply Co., supra, 208 NLRB at 680.

Among the factors considered in this inquiry are the background against which the controversy arose, the setting in which the picketing took place, the assertions of purported object, and any inconsistent actions or statements of union representatives. See, e.g., San Francisco Culinary Workers (McDonald's System of Calif.), 203 NLRB 719, 725 (1973), enf'd. as modified, 501 F. 2d 794 (C.A. D.C., 1974); Retail Clerks International Association No. 899 (State-Mart, Inc.), supra, 166 NLRB at 822, n. 6. For, "an unlawful objective in picketing is rarely proved by admission, but, rather, must be ascertained from Respondent's overall conduct, which would include the past relations between the parties as well as the context in which the picketing occurred." International Brotherhood of Electrical Workers, Local 953 (Erickson Electric), supra, 154 NLRB at 1305. See also N.L.R.B. v. Knitgood Workers Union Local 155, supra, 403 F. 2d at 390-391; Teamsters Local Union No. 5 (Barber Bros. Const. Co.), 171 NLRB 30 (1968), enf'd. 405 F. 2d 864 (C.A. 5, 1968).

Accordingly, where a union's picketing activities, ostensibly to protest the employer's substandard wages and benefits, is accompanied by a demand, not merely that the employer's total wage and benefit cost package equal those of other area employers bound by the union's contracts, but that the employer provide the identical wages, hours and other benefits, the Board, with court approval, has consistently inferred "a purpose to impose a bargaining relationship on the employer, contrary to the provisions of Section 8(b)(7) of the Act." Local Joint Executive Board, Bartenders &

Culinary Workers of Las Vegas & Vicinity (Holiday Inns of America), 169 NLRB 683, 684 (1968). As the Board explained in State-Mart, Inc., supra, 166 NLRB at 823-824:

Except insofar as the demands made can be regarded as directly related or incidental to the protection of the economic gains already achieved, they should not encompass any element of bargaining for working conditions for employees that the union does not represent. * * * The lawful object effectively can be achieved by assuring that the unorganized employer is required to pay employee costs equivalent to those paid by the organized employer. To insist that its negotiated standards is in danger unless the organized employer is subject to equal costs is a reasonable pursuit of the lawful object, but an attempt to dictate how the cost package is to be distributed sounds in terms of bargaining. * * * Thus, it would appear reasonable that a union might picket for wages or for equivalent costs, but when it goes beyond this and attempts to dictate what benefits are to be granted, it is attempting to engage in pro tanto bargaining to gain benefits for employees which it does not represent.

Accord: Alpha Beta Acme Markets, Inc., supra, 205 NLRB at 469; ^{11/} San Francisco Joint Board, International Ladies Garment Workers Union, AFL-CIO (Romay of California), 171 NLRB 761, 768-769 (1968); Centralia Building & Const. Union Trades Council v. N.L.R.B., supra, 363 F. 2d at 701.

The inference that the union has an impermissible recognitional object is even more compelling where the union seeks to force the picketed employer to adopt non-cost items provided in the union's area agreements such as seniority and layoff policies. For such matters do not "sound in

^{11/} "When relying on a standards defense, the union goal must be shown . . . to protect the negotiated area standards from the unfair competitive advantage that would come to an employer whose labor cost package was less than those of employers subjected to the area contract standards."

terms of economic advantage but appear as the direct fruits of a collective bargaining relationship . . .," State-Mart, Inc., supra, 166 NLRB at 823, and, consequently, are matters "irrelevant" to a legitimate area standards appeal. West Coast Cycle Supply Co., supra, 208 NLRB at 680 and n. 8.

In the instant case, the Union began picketing CCC in October, 1976, and continued to picket daily until the injunction issued below on May 26, 1977. The Union concedes that it was not the certified bargaining representative of CCC's employees and that it has not filed a petition for an election among CCC's employees under Section 9(c) of the Act. Thus, if the picketing had an object, not necessarily the sole object, of forcing or requiring CCC to recognize and bargain with the Union, or of forcing CCC's employees to accept the Union as their bargaining representative, the picketing plainly violated Section 8(b)(7)(C) of the Act.

The Union asserts that its picketing was at all times exclusively for the lawful purpose of protesting CCC's allegedly substandard wages and benefits, and it may be conceded that the picket legends employed by the Union throughout conformed to area standards language. It may also be conceded that until March, 1977, CCC in fact did pay its employees wages and benefits below the prevailing standards in the area. However, as set forth above, pp. 18-21, this does not end the inquiry; for the Board does not accept at face value a union's self-serving picket legends or statements of intent, but examines the totality of the circumstances, including the conduct and demands of the union's representatives, in determining whether picketing is in fact for an object prohibited by Section 8(b)(7) of the Act. We submit that, applying the settled principles set forth above to the undis-

puted facts in the instant case, the court below properly found reasonable cause to believe that the Union's picketing was intended to require more of CCC than the payment of wages and benefits equal in total cost to the Union's area contracts, and that at least "an object" of the picketing was one proscribed by the Act.

Thus, as shown in the Counterstatement of Facts, supra, p. 6, after completing a study of the contract supplied by the Union, in March, 1977 CCC increased its employees' wages to exceed the Union's area standards and established a welfare fund to which it contributed \$75 per week for each eligible employee. The net result was that CCC then met, on the whole, all the cost items in the Union's standard area contract (A. 32, 35; 48-54, 56, 73, 92). ^{12/} Accordingly, on April 20, CCC sent a telegram to

12/ The Union contends (Br. 9, 10, 17) that the welfare plan was "fabricated" and, therefore, may not properly be considered in determining the true cost of CCC's wage and benefit package. This argument is based entirely on the purported testimony of Company counsel McDonough that the welfare trust was not irrevocable and that "The company may find something else to do with the money." (Br. 9, 10, 17). The Union's argument is disingenuous. An examination of the record reveals that the trust is, by its terms, irrevocable (A. 94). Moreover, the cited testimony of McDonough was in response to Union counsel's query, on cross examination, whether, at the May 4 meeting between the Union and CCC, Union counsel had asked McDonough whether CCC had obtained approval (tax exempt status) for its welfare plan and trust from the Internal Revenue Service. Company counsel McDonough's response, in context, was as follows (A. 80):

A. (McDonough): Yes, you did. I explained that the Company did not know whether they wanted to go through all that. I had seen other plans that received IRS approval that were 75 pages long. We were talking about a plan for three people. I said "The Company may find something else to do with the money. It is an incredible procedure to get IRS approval."

(Continued on page 23)

the Union informing it of the changes in CCC's labor cost package and request requested the Union to cease picketing.

Thereafter, on May 4, a meeting was conducted between CCC and the Union at which CCC made a comparison of benefits to demonstrate that it equaled or bettered the Union's area standards. At the close of CCC's presentation, Union counsel Harold's response was the flat statement that "unless you meet this contract term for term then you are not meeting area standards" (Supra, p. 7). When Harold reiterated that CCC was not paying area standards because it was not meeting the Union contract "point for point," Union Secretary-Treasurer Revellese observed that "you don't have any seniority; you don't have job security; you don't have layoff programs" (Ibid.). Finally, in answer to McDonough's inquiry as to precisely what were the area standards CCC must meet, Harold simply pointed to the Union's contract, thereby reaffirming his insistence that CCC would have to match the Union's contract "point for point" and "term for term" (Ibid.). At this juncture, the meeting terminated. The Union's picketing continued thereafter until enjoined.

12/
Continued The Union's repeated mischaracterization of this testimony could be nothing less than a deliberate distortion of the record.

Similarly, the purported testimony of Company Vice-president and General Manager Zaccaria, presented at page 9 of the Union's brief as what appears to be a block quotation, is in reality no more than a compilation of Union counsel's questions directed to Mr. Zaccaria on cross examination.

As the court below correctly concluded, "Harold's insistence that the Union contract be met point by point indicates that the dispute has surpassed the scope of area standards and has trespassed into the realm of collective bargaining" (A. 35). Moreover, Revell's pointed reference to such non-cost items as seniority and layoff procedures virtually compels the conclusion that the Union was not interested in merely requiring CCC to become cost competitive, but was seeking, instead, to obtain specific benefits for employees it did not represent and to impose on CCC a bargaining relationship, contrary to the language and intent of Section 8(b)(7)(C) of the Act. ^{13/} See the discussion and cases cited supra, pp. 15-21.

The Union raises several procedural defenses to the issuance of the injunction below, all of which are clearly without merit.

First, the Union apparently contends (Br. 3-4, 12, 18, 23) that the Regional Director's dismissal of CCC's first unfair labor practice charge (Board Case No. 2-CP-563) on December 27, 1976, and the General Counsel's Office of Appeals' affirmance of that dismissal on March 4, 1977, ^{14/} constituted a bar to the issuance of complaint and petition for injunctive relief in the instant case. This contention, whether viewed as an assertion of res adjudicata or of equitable estoppel, is wholly untenable.

^{13/} Contrary to the Union's suggestion (Br. 7, 15, 16, 23), its assurances, at the beginning of the May 4 meeting, that it was not seeking recognition or bargaining, do not dictate a contrary result. Such self-serving declarations cannot serve to insulate the Union where other, objective evidence, belies the disclaimer. See, for example, State-Mart, Inc., supra, 166 NLRB at 820-821; West Coast Cycle Supply Co., supra, 208 NLRB at 681, and Centralia Building and Construction Trades Council v. N.L.R.B., supra, 363 F. 2d at 701, where violations were found despite the unions' express disclaimers of any recognition interest or intent.

^{14/} See supra, p. 5 and note 7.

As the Fourth Circuit long ago stated in N.L.R.B. v. Baltimore Transit Co., 140 F. 2d 51, 54-55 (1944), in rejecting the same argument:

Whatever may be the effect of quasi-judicial determinations of administrative agencies, it is well settled that the principle of res adjudicata has no application to the exercise of other powers. An administrative agency, charged with the protection of the public interest, is certainly not precluded from taking appropriate action to that end because of mistaken action on its part in the past. Nor can the principles of equitable estoppel be applied to deprive the public of the protection of a statute because of mistaken action or lack of action on the part of public officials. (Citations omitted).

Thus, as the Sixth Circuit stated in similar circumstances, "The first charge's dismissal was in no sense an adjudication The dismissal was at most 'an administrative determination not to take action.' [citing N.L.R.B. v. Baltimore Transit Co., *supra*]. The Regional Director's dismissal of the Union's February 22 charge was not a 'final and binding adjudication,' which is required to trigger the operation of res judicata." (Citations omitted) N.L.R.B. v. Basic Wire Products, Inc., 516 F. 2d 261, 266-267 (1975). Cf. N.L.R.B. v. Falls Dodge, Inc., 431 F. 2d 33, 35 (C.A. 6, 1970) ("We do not believe that the denial of respondent's unfair labor practice complaint by the Regional Director and Appeals Director rendered respondent's claim that the strike was illegal res adjudicata." Cf. also, N.L.R.B. v. Rochester Musicians Association, 514 F. 2d 988, 990-991 (C.A. 2, 1975).

The Union's argument (Br. 2, 5-6, 11, 13, 24) that the Board's complaint and, therefore, the petition for injunctive relief, were totally defective because they relied on evidence of conduct occurring after the Company's charge was filed, has long been put to rest. As this Court

explained in affirming a Section 10(j) injunction over the respondent's objection that it was under no duty to bargain on the date when the refusal to bargain charge was filed:

In short, the "charge" must allege the unfair labor practice to invoke the jurisdiction of the Board; and, by way of limitation, the complaint issued by the Board must deal with the same subject matter and sequence of events, N.L.R.B. v. National Licorice Co., 2 Cir., 104 F. 2d 655, 658, although the specific events stated in the complaint may precede or follow those stated in the "charge."

Douds v. International Longshoremen's Association, 241 F. 2d 278, 284 (C.A. 2, 1957). Similarly, this Court has unhesitatingly sustained the Board's findings of violations on the basis of conduct occurring after the filing of the charge, and even after the issuance of the complaint, so long as the violations found were closely related to the violations initially alleged and the matter was fully litigated at the hearing. See, e.g., N.L.R.B. v. Local 239, Teamsters, 289 F. 2d 41, 45 (1961); N.L.R.B. v. Dinion Coil Co., 201 F. 2d 484, 491 (1952); N.L.R.B. v. Gaynor News Co., 197 F. 2d 719, 721-722 (1952), aff'd., 347 U.S. 17, 34, n. 30 (1954). See generally, N.L.R.B. v. Fant Milling Co., 360 U.S. 301 (1959).

So, here, the petition for injunctive relief alleges the very violation contained in the underlying unfair labor practice charge and neither it nor the district court's decision is defective simply because they rely on Union conduct occurring after the charge was filed. For, contrary to the Union's assertions (Br. 2, 10, 18-19, 24), the Board did not wait until after the close of the hearing to raise, for the first time, the Union's insistence at the May 4 meeting that CCC met its area contract "term

for term"; rather, the record clearly demonstrates that this issue was both expressly pleaded and fully litigated at the hearing.

Thus, Paragraph 5(k) of the petition (A. 8) specifically alleges that Union counsel insisted on identical benefits for CCC's employees at the May 4 meeting; Paragraph 5(l) alleges that the conduct described in Paragraph 5(k) was intended to force CCC to recognize and bargain with the Union (Ibid.); and Paragraph 6 alleges that such conduct, in conjunction with the Union's picketing, violated Section 8(b)(7)(C) of the Act (Ibid.). Moreover, Company counsel McDonough's testimony, both on direct and cross-examination, dealt exclusively with the discussions at the May 4 meeting (A. 76-81). And it is perfectly clear from Union counsel's cross-examination of McDonough that the Union was fully aware of the import of his testimony (A. 80-81).

Consequently, despite the Union's protestations (Br. 2, 10, 11, 18-19), the district court's denial of the Union's post-decision request to reopen the record on the basis of surprise (A. 88-90) was manifestly correct and did not constitute an abuse of discretion. Diapulse Corporation of America v. Birtcher Corporation, 362 F. 2d 736, 744 (C.A. 2, 1966); Helene Curtis Industries v. Sales Affiliates, 233 F. 2d 148, 166-167 (C.A. 2, 1956).

In sum, the Regional Director had reasonable cause to believe the Union was violating Section 8(b)(7)(C) of the Act, the district court properly so found and, in view of the controlling Board precedent upon which the Regional Director and the district court relied, that holding cannot be characterized as "clearly erroneous." Moreover, in light of the

undisputed facts indicating a continuing violation of the Act, issuance by the district court of an injunction in the Section 10(1) proceeding was unquestionably "just and proper," and not an abuse of its discretion.

CONCLUSION

For the foregoing reasons, the Board respectfully submits that the district court's order granting the Regional Director's petition for temporary injunctive relief should be affirmed.

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No. 77-6093

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

WINIFRED D. MORIO, Regional Director of
Region 2 of the National Labor Relations
Board, for and on behalf of the NATIONAL
LABOR RELATIONS BOARD,

Petitioner-Appellee,

v.

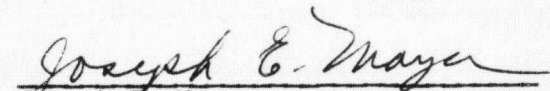
LOCAL 456, INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND
HELPERS OF AMERICA,

Respondent-Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of the Brief
For Petitioner-Appellee in the above-captioned case were duly mailed in
a government franked envelope on this day to counsel for Respondent-
Appellant at the address listed below.

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Dated this 25th day of July, 1977
at Washington, D.C.